

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SAN DIEGO MINUTEMEN, an
unincorporated association,

Plaintiff,

vs.
CALIFORNIA BUSINESS,
TRANSPORTATION AND HOUSING
AGENCY'S DEPARTMENT OF
TRANSPORTATION; DALE BONNER, in
his Official capacity as Agency Director,
Business, Transportation and Housing
Agency; WILL KEMPTON, in his Official
Capacity as CalTrans Director; PEDRO
ORSO-DELGADO, in his Official Capacity
as CalTrans District Director; and DOES 1
through 50,

Defendants.

CASE NO. 08CV210 WQH (RBB)

ORDER DENYING MOTION FOR
ISSUANCE OF A TEMPORARY
RESTRANDING ORDER AND SETTING
BRIEFING SCHEUDLE FOR MOTION
FOR PRELIMINARY INJUNCTION

HAYES, Judge:

Pending before the Court is Plaintiff's request for a temporary restraining order. (Docs. # 2,

5). The Court finds this matter suitable for submission on the papers and without oral argument.

BACKGROUND

On February 4, 2008, Plaintiff San Diego Minutemen filed a Complaint against Defendants the California Business, Transportation and Housing Agency's Department of Transportation; Dale Bonner, Agency Director of the California Business, Transportation and Housing Agency; Will

1 Kempton, Director of the California Department of Transportation (CalTrans); and Pedro Orso-
 2 Delgado, CalTrans District Director. (Doc. # 1). The Complaint alleges that Defendants violated
 3 Plaintiff's constitutional rights to freedom of expression and due process in revoking Plaintiff's
 4 Adopt-a-Highway permit and removing Plaintiff's Adopt-a-Highway courtesy sign from its location
 5 along Interstate 5 at San Onofre, California. (Doc. # 1). In addition to the Complaint, Plaintiff filed
 6 the pending motion for a temporary restraining order and preliminary injunction (Docs. # 2, 5), as well
 7 as an ex parte application for an order allowing Plaintiff to take expedited discovery (Doc. # 3).

8 FACTUAL BACKGROUND

9 Plaintiff San Diego Minutemen is an association whose mission statement is:

10 To demand the maximum border security and immigration enforcement both locally
 11 and at the national level. We oppose illegal immigration in all parts of San Diego
 12 County with our activism. We assist and support the U.S. Border Patrol in securing
 13 the U.S.-Mexican border from terrorists, gang members, criminals, drugs, and illegal
 14 aliens entering the United States. We also assist ICE (Immigration & Customs
 15 Enforcement) and local law enforcement in exposing law breaking employers and
 16 helping to return illegal aliens to their country of legal residence. We act on behalf of
 17 and in accord with the United States Constitution and the Bill of Rights.

18 *Declaration of Jeff Schwilk (Schwilk Decl.), ¶ 3.*

19 On September 18, 2007, Plaintiff San Diego Minutemen applied to be part of the Adopt-a-
 20 Highway Program administered by Defendant CalTrans. *Schwilk Decl.*, Ex. 5. On or around
 21 November 19, 2007, CalTrans admitted Plaintiff into the Adopt-a-High Program, and awarded
 22 Plaintiff an Adopt-a-Highway Encroachment Permit. *Schwilk Decl.*, ¶¶ 4-5. The Encroachment
 23 Permit identified Plaintiff's litter-removal area as "11-SD-005 PM 66.3-68.3 N/B," which corresponds
 24 to an area along Interstate 5 in San Onofre, California. *Schwilk Decl.*, ¶ 8 & Ex. 5. On or about
 25 January 17, 2008, members of Plaintiff San Diego Minutemen collected litter along the assigned
 26 portion of Interstate 5 in compliance with the Encroachment Permit. *Schwilk Decl.*, ¶ 5 & Ex. 2.

27 On January 28, 2008, Plaintiff received a letter from Defendant Pedro Orso-Delgado, CalTrans
 28 District Director, notifying Plaintiff that Plaintiff's Encroachment Permit "is hereby modified," and
 that "the related courtesy sign will be removed." *Schwilk Decl.*, Ex. 3. The letter noted that,

29 The location of your existing Adopt-a-Highway (AAH) permit has raised questions
 30 regarding public safety due to the proximity of your assigned highway segment to a
 31 U.S. Border Patrol facility that is co-located with the California Highway Patrol (CHP)
 32 San Onofre Inspection facility. Your group has also indicated concerns regarding
 33 possible vandalism to the courtesy sign displaying your participation in the AAH

Program and the release of information relative to the days you will perform the required clean up.

Schwilk Decl., Ex. 3. The letter further noted that Plaintiff's participation in the Adopt-a-Highway Program at the location in San Onofre, "poses a significant risk of disruption to the operation of the State highway, as well as public safety concerns for both the traveling public and the participants in the AAH Program," and that CalTrans was "currently examining allegations of violent behavior and/or advocacy of violence by [Plaintiff's] group." *Schwilk Decl.*, Ex 3. Finally, the letter stated that,

Under the AAH Program eligibility criteria, entities that advocate violence, violation of the law, or discrimination based upon race, religion, color, national origin, ancestry, physical handicap, medical condition, marital status, age, sex, or sexual orientation may not participate in the Program.

Schwilk Decl., Ex 3.

On or after January 28, 2008, Defendants removed the Adopt-a-Highway courtesy sign identifying Plaintiff San Diego Minutemen from its location along Interstate 5 in San Onofre, California. *Schwilk Decl.*, ¶ 3.

STANDARD OF REVIEW

15 FED. R. CIV. P. 65(b) provides that the court may issue a temporary restraining order (TRO)
16 without notice to the adverse party where “specific facts in an affidavit or a verified complaint clearly
17 show that immediate and irreparable injury, loss, or damage will result to the movant” The
18 standard for issuing a TRO is similar to the standard for issuing a preliminary injunction, and requires
19 that the party seeking relief show either “(1) a combination of likelihood of success on the merits and
20 the possibility of irreparable harm, or (2) that serious questions going to the merits are raised and the
21 balance of hardships tips sharply in favor of the moving party.” *Homeowners Against the Unfair*
22 *Initiative v. Calif. Building Industry Assoc.*, Civil No. 06CV152 JAH (WMc), 2006 U.S. Dist. LEXIS
23 97023, *4 (S.D. Cal. Jan. 26, 2006) (citing *Immigrant Assistance Project of the L.A. County of Fed'n*
24 *of Labor v. INS*, 306 F.3d 842, 873 (9th Cir. 2002)). “[T]hese two formulations represent two points
25 on a sliding scale in which the required degree of irreparable harm increases as the probability of
26 success decreases.” *Dep’t Parks & Rec. of Calif. v. Bazaar Del Mundo, Inc.*, 448 F.3d 1118, 1123
27 (9th Cir. 2006) (citations omitted).

28 The underlying purpose of a temporary restraining order (TRO) is to preserve the status quo

1 and prevent irreparable harm before a preliminary injunction hearing may be held. *Granny Goose*
 2 *Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers*, 415 U.S. 423, 439 (1974); *see also Reno Air*
 3 *Racing Ass'n v. McCord*, 452 F.3d 1126, 1130-31 (9th Cir. 2006); *Homeowners Against the Unfair*
 4 *Initiative v. Calif. Building Industry Assoc.*, Civil No. 06CV152 JAH (WMc), 2006 U.S. Dist. LEXIS
 5 97023, *4 (S.D. Cal. Jan. 26, 2006).

DISCUSSION

7 Plaintiff's motion for a TRO seeks to enjoin Defendants from "assigning the SAN DIEGO
 8 MINUTEMEN sign location to any other person or entity until such time as this Court can consider
 9 a request for a preliminary injunction . . ." (Doc. # 2 at 1); *see also* (Doc. # 1, ¶ 5). Plaintiff
 10 contends that Defendants have violated Plaintiff's constitutional rights, and that those violations
 11 conclusively establish that irreparable harm will ensue if the TRO is not granted. (Doc. # 2 at 6).
 12 Plaintiff further contends that there is a high probability that Plaintiff will succeed on the merits of the
 13 Complaint. (Doc. # 2 at 23).

14 As noted above, the purpose of a TRO is to preserve the status quo before a preliminary
 15 injunction hearing may be held. *See Granny Goose Foods*, 415 U.S. at 439. Here, Plaintiff's TRO
 16 seeks to preserve the current status quo with respect to Plaintiff's former Adopt-a-Highway location
 17 identified by CalTrans as "11-SD-005 PM 66.3-68.3 N/B.," which is that no person or entity is
 18 currently assigned to that location. *See Schwilk Decl.*, ¶ 8 & Ex. 5. Specifically, Plaintiff's TRO
 19 seeks to enjoin Defendants from assigning Adopt-a-Highway location 11-SD-005 PM 66.3-68.3 N/B
 20 to any other person or entity until such time as this Court can consider Plaintiff's motion for a
 21 preliminary injunction.

22 Plaintiff alleges irreparable harm to its constitutional rights to freedom of expression and due
 23 process if the TRO is not granted. Plaintiff further contends that it has established a likelihood that
 24 it will succeed on the merits of its constitutional claims as alleged in the Complaint. However,
 25 Plaintiff has not shown that the relief sought in the TRO—namely, that Defendants not be able to assign
 26 Plaintiff's former Adopt-a-Highway location to a third party—will impact or prevent the harms alleged.
 27 Indeed, the Court finds that Plaintiff has not established or alleged facts to support the claim that
 28 Defendants assignment of Plaintiff's former Adopt-a-Highway location to a third party would cause

1 irreparable harm to Plaintiff's constitutional rights to freedom of expression and due process, or that
2 granting the TRO will prevent such harm. Plaintiff has not alleged any relation between the relief
3 requested in the motion for TRO, and the harms alleged in the TRO. *See Price v. City of Stockton*,
4 390 F.3d 1105, 1117 (9th Cir. 2004) (noting that a restraining order must be narrowly tailored only
5 to remedy the specific harm shown by the plaintiff); *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549,
6 558 (9th Cir. 1990).

7 Plaintiff's motion for a TRO (Docs. # 2, 5) is DENIED.

8
9 The Court now sets the following briefing schedule for Plaintiff's motion for a preliminary
10 injunction to enjoin Defendants from assigning Plaintiff's former Adopt-a-Highway location to a third
11 party (Doc. # 2):

12 1. Defendants shall file a response to the motion for preliminary injunction on or before
13 **Friday, February 29, 2008.**

14 2. Plaintiff's may file a reply in support of the motion for preliminary injunction on or before
15 **Friday, March 7, 2008.**

16 3. The parties shall appear for a hearing on the motion for preliminary injunction on **Friday,**
17 **March 14, 2008, at 1 P.M.**

18 Plaintiff's motion for expedited discovery (Doc. # 3) is hereby referred to the Honorable
19 Magistrate Judge Ruben B. Brooks.

20 **IT IS SO ORDERED.**

21 DATED: February 7, 2008


WILLIAM Q. HAYES
United States District Judge

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